D. RAY GORDON
v.
BUREAU OF LAND MANAGEMENT

IBLA 94-194 Decided August 26, 1997

Appeal from a decision of Administrative Law Judge Ramon M. Child setting aside a decision of the Bureau of Land Management denying in part an application for a grazing lease. ID-030-92-3.

Affirmed.

1. Grazing Leases: Cancellation or Reduction--Grazing Permits and Licenses: Base Property (Land): Ownership or Control

When the record supports a finding that the grazing lessee did not lose control of the base property to which his grazing preference was attached, an Administrative Law Judge's decision setting aside a Bureau of Land Management decision denying an application for a grazing lease in part and reducing grazing preference and AUM's will be affirmed on appeal.

APPEARANCES: Kenneth M. Sebby, Esq., Office of the Solicitor, Boise, Idaho, for the Bureau of Land Management; Robin D. Dunn, Esq., Rigby, Idaho, for D. Ray Gordon.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Bureau of Land Management (BLM) has appealed the November 16, 1993, Decision of Administrative Law Judge Ramon M. Child setting aside and remanding a June 5, 1992, Final Decision of the Idaho Falls District Manager, BLM, denying in part D. Ray Gordon's application for a 1992 grazing lease by allowing use only of reduced animal unit months (AUM's) and establishing the reduced AUM's as his new grazing preference.

In February 1991, BLM issued a 10-year grazing lease to Gordon for 196 AUM's on the Victor Allotment in Idaho, where he held a grazing preference since about 1960. (Ex. G-13; Tr. 142.) In its Final Decision, BLM reduced Gordon's grazing preference on the Victor Allotment from 196 AUM's to 17 AUM's, denied Gordon's 1992 application for a license to graze the allotment at a use level of 196 AUM's, and authorized Gordon to graze at
a use level of only 17 AUM's. The Final Decision was based on 43 C.F.R.

§ 4110.2-1(d), which provides that if a permittee or lessee loses ownership or control of all or part of his base property the permit or lease shall terminate immediately to the extent it was based upon such lost property. The BLM found Gordon had lost control of all but 40 acres of his base property and reduced his AUM's proportionately. See 43 C.F.R. § 4110.2-2(c)(1); Ex. A-16; Tr. 26-27, 35.

In March 1989, Gordon and his wife transferred to Jerry Linn by warranty deed a portion of his base property to which the Victor Allotment preference was attached. (Exs. A-1, G-3; Tr. 31.) Contemporaneously with this transaction Linn executed a 20-year mortgage designating the Gordons as mortgagees to secure Linn's obligation to pay for the land in monthly installments. On March 27, 1989, the Gordons and Linn signed a document (the Linn Agreement) stating "the following additional terms which shall [be] a part of the face agreement dated March 27, 1989," and granting the Gordons the right to graze cattle and the right to use the land as base property for the term of the mortgage. (Ex. G-18; Tr. 145-47, 202-05.) The Linn Agreement provided:

> Because of the geographical location of Lot 5 Section 29 T.S. 4 N, R 46 E.B.M. in relation to public grazing and the remaining private land located in Sections 20 and 29[,] Buyers and Seller's [sic] agree that no grazing rights will be transferred to the buyers and that Seller's [sic] shall retain the rights to continue listing and using subject property as a part of that base property until other properties are purchased and base property rights are transferred to said property or upon the satisfaction of the mortgage note which documents the balance due mortgagee. Seller shall release the original mortgage securing the balance due Seller's [sic] by Buyer's [sic] and the grazing agreement shall no longer be in force or effect.

(Ex. G-18.)

On March 5 and August 1, 1991, the Gordons sold the remaining portions of the base property adjacent to the Victor Allotment to John C. and Laura M. Grabow. Each sale was accomplished by warranty deed, (Exs. A-2, A-5, G-4; Tr. 32), and mortgage designating the Gordons as mortgagees, (Exs. A-3, A-6). A Pasture Use Agreement was executed contemporaneously with the March 1991 sale, (Ex. A-4; Tr. 160-61), setting forth the "terms and conditions related to the continued use of the subject property, for grazing purposes, subsequent to sale of the following described real property * * *." The Pasture Use Agreement stated:

> WHEREAS, Gordons have agreed to sell a portion of the subject property to Grabows and said parties intend that Gordons shall continue to use the subject property for cattle grazing purposes, when Gordons cattle are not grazing on public lands, subsequent to closing of purchase and sale. This Agreement shall be binding upon the parties, hereto, simultaneous with closing of sale of a portion of the subject property. Furthermore, Gordons

intend to sell to Grabows the remainder of the subject property, otherwise not sold initially and at a later date; whereby this Agreement shall be a condition to and be binding upon said subsequent sale.

* * * * * * *

(1) AGREEMENT TO PASTURE USE: Grabows, upon closing of purchase and sale, of a portion of the subject property, hereby grant to Gordons the right to continue to pasture (graze) cattle upon the subject property.

(2) TERM OF AGREEMENT: Grabows hereby grant to Gordons the continued right to use the subject property for cattle grazing purposes, from the date hereof, and for a period of two years thereafter. Subsequent to the agreed upon two year term, this Agreement may be extended, thereafter, or terminated upon Grabows providing to Gordons a written notice to extend or terminate this Agreement.

(3) COMPENSATION: Gordons shall pay to Grabows the sum of $1.87 per animal unit month (AUM) upon the termination of the grazing season in each year subsequent to this Agreement. Gordons shall provide Grabows with a statement of accounting, reflecting the AUM's consumed during any given grazing season. Grabows or their appointed agent shall have the right to inspect the subject property, so as to assure that Gordons shall not overgraze same. Should Grabows determine that overgrazing has occurred, Grabows shall have the right to have Gordons remove cattle from the subject property.

(4) CATTLE CONTAINMENT RESTRICTED TO THE SUBJECT PROPERTY:Gordons shall be responsible to contain all cattle on the property, to include prohibiting cattle from accessing onto existing rights-of-ways existing on the subject property and to prohibit cattle from accessing neighboring property.

(5) GORDONS RESPONSIBLE FOR ALL LIABILITY AND LOSSES: Gordons hereby agree to hold Grabows harmless from any liability incurred, as a result of Gordons negligence, to include damages or injuries incurred by others, as a result of Gordons cattle grazing on the subject property.

(Ex. A-4; Tr. 161.) The Pasture Use Agreement contained a 2-year term. A "Pasture Use Extension Agreement," entered into on July 13, 1993, extended the term of the agreement for an additional 2 years and provided for an automatic 2-year extension beyond that date through March 1, 1997. (Ex. A-21.)

Based on a hearing he conducted on July 22, 1993, Judge Child set aside BLM's Final Decision, finding that "Gordon never lost and still retains the right to use and control, for grazing purposes, all of his

base property sold to Linn and the Grabows." (Decision at 8.) Reciting the definition of "control" in 43 C.F.R. § 4100.0-5 as "being responsible for and providing care and management of base property and/or livestock," Judge Child noted that in 1938

> Assistant Secretary Chapman ruled that a party must occupy land claimed as base property under color of title or valid claim in order to establish ownership or control of the land. A.L. Murry, IGD 120, 123 (1938). Accord, Silvino Ortiz v. Bureau of Land Management, 126 IBLA 8, 13 (1993). Similarly, in James E. Briggs v. Bureau of Land Management, 75 IBLA 301, 303, (1983), the Board noted that the word "control," applied to real property, implies possession.

(Decision at 4.)

Judge Child continued:

> In the present case, Gordon has established control of the base property under the regulation at 43 CFR 4100.0-5, because Gordon has shown that he may occupy and has occupied the sold property as base for his livestock operation under color of written agreement.
>
> The status of Gordon on one side, and Linn and the Grabows on the other side of the land transactions, is that of mortgagee and mortgagors, respectively. Under Idaho law, Gordon, as seller and mortgagee, merely holds a lien as security for payment of the purchase price on each sale. See Hannah v. Vensel, 116 P. 115, 116-117 (Idaho 1911); Idaho Code §§ 6-104, 45-901, 45-904. Linn and the Grabows, as purchasers and mortgagors, hold legal title to the lands which were purchased from and mortgaged to Gordon. Hannah, 116 P. at 117. Therefore, the purchasers and mortgagors, Linn and the Grabows, possess all the rights of ownership, subject only to Gordon's right to foreclose if they default on their mortgage payments. See 55 Am. Jur. 2d §§ 178-179.
>
> Consistent with this law, Grabows' Warranty Deeds provide: "And the Grantors and their heirs shall and will warrant and by these presents forever defend the premises in the quiet and peaceable possession of Grantees...." (Exs. A-2, A-3)[.] BLM places great emphasis on the quoted language as evidencing an intent that the Grabows are entitled to possession and control of the base property sold to them.
>
> But these documents must be read together with the Pasture Use Agreement executed contemporaneous with the first sale. That agreement governs the parties' conduct with regard to all of the property sold to the Grabows. That agreement clearly gives Gordon the right to use the land as his base property for cattle grazing. (Ex. A-4.) The language of the Warranty Deeds

> is not to the contrary, as the deeds bestow upon the Grabows the ultimate right to possession and other ownership rights, subject to Gordon's continuing right of possession for grazing purposes for the life of the Pasture Use Agreement and any extensions thereof.

(Decision at 4-5.)

Quoting portions of the Pasture Use Agreement and the Linn Agreement, (Exs. A-4, G-18), set forth above, Judge Child concluded that these agreements "clearly give Gordon the right (a valid claim) to continued use of the base property for grazing purposes." (Decision at 6.) He continued:

> Moreover, the evidence shows that Gordon has maintained "control" over the base property by retaining and exercising this right. He testified that "[m]y control over that base property is the same as it was when I owned it. I have the same, I have the same responsibilities to take care of it." (Tr. 197-198). He elaborated as follows:
>
> Q. And do you exhibit some control over this property?
>
> A. Yes.
>
> Q. How so?
>
> A. I have the right to graze it, and I'm responsible for taking care of it, taking care of any livestock that graze on it.
>
> Q. And what does those, what do these duties entail?
>
> A. Well, the repairing of any fence, and taking care of it, making sure the animals don't stray. If they do, I'm responsible for any damage they do. I'm responsible for their health, their salting and so forth; see[ing] that they have water.
>
> (Tr. 156). His testimony regarding control of the base property is supported by letters from those involved in the land transactions (Ex. A-11, A-13).

(Decision at 7.)

Judge Child concluded that Gordon had shown by a preponderance of the evidence that he was entitled to use and possession of the base property for grazing purposes and was responsible for and provided care and management of the base property and livestock. Gordon's situation, he observed, "is virtually indistinguishable from that of the many other grazers of the public lands who obtain control over their base property through a leasing arrangement." (Decision at 7.)

In response to BLM's arguments concerning the limitations on Gordon's control, Judge Child noted that the Grabows have the right to force removal

of cattle from the base property if they determine that overgrazing has occurred, but concluded this was not a significant limitation on Gordon's control because sound range management dictates against overgrazing, and there was no evidence that Gordon was inclined to overgraze. Until this or one of the other conditions of the agreement occurs, "Gordon retains essentially exclusive right to use and control the entire base property," Judge Child concluded. (Decision at 7.) Should one of these conditions occur, resulting in Gordon's loss of control of the base property before any transfer of his preference to other base property, 43 C.F.R. § 4110.2-1(d) provides for automatic termination of the grazing preference. Because none of the conditions had yet occurred, Judge Child found BLM erred in concluding Gordon has lost both ownership and control of his base property. Id. at 7-8.

The BLM maintains on appeal that Gordon lost both ownership and control by virtue of the sales to Linn and the Grabows. The practical effect of upholding Judge Child's Decision, BLM urges, is to place BLM in the "position of dealing not only with its permittee, Gordon, but with the nonpermittees, the Grabows, or their agents, with respect to the base property and other administrative functions." (BLM's Statement of Reasons and Argument (SOR) at 3-4.) The BLM argues it cannot effectively administer grazing authorizations if individuals can decide what is or is not base property with no notification to or approval by the authorized officer. Id. at 4.

The BLM challenges Judge Child's acceptance of the "undated" additional terms to the Linn Agreement and the Pasture Use Agreement as evidence of sufficient control retained by Gordon satisfying the regulatory definition of control. Pointing to Judge Child's statement construing the deeds, the Linn Agreement and the Pasture Use Agreement, BLM states that the Pasture Use Agreement was not referred to in either conveyance. The BLM argues the Pasture Use Agreement was not recorded, provided notice to no one, and did not affect record title. The BLM emphasizes that neither the warranty deeds nor the Pasture Use Agreement utilize the term "base property." The agreements retain only the right to graze, which right alone BLM maintains is insufficient.

Noting that the definition of base property means "land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year," 43 C.F.R. § 4100.0-5, BLM argues that under the Pasture Use Agreement Grabow is not permitted to use the land "to produce crops * * * that can be used to support authorized livestock for a specified period of the year * * *." (SOR at 6.) Referring to the definition of "control" at 43 C.F.R. § 4100.5 as "being responsible for and providing care and management of base property," BLM argues that Gordon does not have control if the Grabows have the right to inspect and control overgrazing. In BLM's eyes, the Grabows' right to inspect and control overgrazing deprives Gordon of control. The BLM urges that "[a]lthough the Grabows granted Gordon the right to graze, they obviously had concern over whether the land could support the cattle to be

grazed and/or over Gordon's management of his cattle with respect to that land." (SOR at 7.)

Gordon's right to use the land, BLM argues, is akin to a permissive use subject to being withdrawn by the Grabows or their agents upon determination that overgrazing has occurred. The BLM relies on Briggs v. BLM, 75 IBLA 301 (1983), arguing that in that case Briggs sought to treat land that he conveyed to a development company as his base property for purposes of calculating his grazing preference because it was open range under Arizona law, and the development company purchaser recognized Briggs' right to graze until the private land was fenced. Finding control to be lacking, the Board stated at page 302: "Even if the statute could be construed as allowing appellant to graze livestock upon this land until it is fenced, it is clear that such permissive use of the land does not constitute ownership or control of base property within the meaning of 43 CFR 4110.2-1."

Citing Grabbert v. Schultz, 12 IBLA 255, 260-61, 80 Interior Dec. 531, 533-34 (1973), the Board continued:

> With reference to land, the courts have held that, in general, to have "control" of a place is to have authority to manage, direct, superintend, or regulate. "Control" does not import absolute or even qualified ownership, but means the power or authority to direct, govern, administer, or oversee. The word applied to real property implies possession.

Briggs v. BLM, 75 IBLA at 303. See also Garcia v. Andrus, 692 F.2d 89 (9th Cir. 1982).

Despite Gordon's claim in testimony that his control is the same as when he owned the land, BLM contends Gordon has significantly less than what he had as an outright owner of the land. Because the Grabows have the right to determine whether overgrazing has occurred, BLM argues they have control over the land for grazing purposes.

The BLM notes that consultation, cooperation, and coordination as those terms are defined at 43 C.F.R. § 4100.0-5 (1992) are important concepts in the management of the public lands. The proposed Idaho Falls District Base Property and Livestock Leasing Policy, (Ex. G-16), was endorsed by the Idaho Falls District Grazing Advisory Board to further those concepts and added to Gordon's grazing lease as a stipulation. The BLM contends that Appellant failed to comply with that portion of the policy requiring a lessee who enters into an agreement that allows someone other than the permittee or lessee to graze livestock on the public lands without controlling the base property supporting the permit or lease to present the livestock lease document to the authorized officer for consideration 30 days prior to the start date of the proposed grazing period. (SOR at 11.)

The Department has limited the scope of review of BLM's grazing decisions by an Administrative Law Judge and by this Board. The regulation at 43 C.F.R. § 4.478(b) provides that an adjudication of a grazing preference will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. 43 C.F.R. § 4.478(b); BLM v. Cosimati, 131 IBLA 390, 398 (1995); Kelly v. BLM, 131 IBLA 146, 151 (1994).

The standard of proof to be applied in weighing the evidence presented at a hearing challenging a grazing decision is the preponderance of evidence test. Thus, an appellant seeking relief from a BLM decision determining a grazing preference bears the burden of showing by a preponderance of the evidence that the BLM decision is unreasonable or improper. Kelly v. BLM, supra, at 151.

The Taylor Grazing Act, 43 U.S.C. § 315m (1994), authorizes the Secretary of the Interior to issue grazing leases on Federal lands that are not situated within grazing districts. To qualify for grazing use on the public lands an "applicant must own or control land or water base property." 43 C.F.R. § 4110.1(a). "Base property" as defined by regulation

> means: (1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and available and accessible, to the authorized livestock when the public lands are used for livestock grazing.
>
> * * * * * * *
>
> "Control" means being responsible for and providing care and management of base property and/or livestock.

43 C.F.R. § 4100.0-5.

A preference under 43 U.S.C. § 315m (1994) is "given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands."

Title 43 C.F.R. § 4110.2-1 (1992) states:

> (a) The authorized officer shall find land or water owned or controlled by an applicant to be base property (see § 4100.0-5) if:
>
> (1) It serves as a base for a livestock operation which utilizes public lands within a grazing district; or

(2) It is contiguous land, or noncontiguous land when no applicant owns or controls contiguous land, used in conjunctionwith a livestock operation which utilizes public lands outside a grazing district.

The BLM decision was founded on its application of 43 C.F.R. § 4110.2-1(d) (1992), which provides:

> If a permittee or lessee loses ownership or control of all or part of his/her base property, the permit or lease, to the extent it was based upon such lost property, shall terminate immediately without further notice from the authorized officer. However, if, prior to losing ownership or control of the baseproperty, the permittee or lessee requests, in writing, that the permit or lease be extended to the end of the grazing decision or grazing year, the termination date may be extended as determined by the authorized officer after consultation with the new owner.

Having found that Gordon lost "control," BLM concluded that no transfer of the preference was possible under 43 C.F.R. § 4110.2-3(c). That regulation provides:

> (c) If a grazing preference is being transferred from one base property to another base property, the transferor shall own or control the base property from which the grazing preference is being transferred and file with the authorized officer a properly completed transfer application for approval. If the applicant leases the base property, no transfer will be allowed without the written consent of the owner(s), and any person or entity holding an encumbrance of the base property from which the transfer is to be made. Such consent will not be required where the applicant for such transfer is a lessee without whose livestock operations the grazing preference would not have been established.

We have consistently held that a loss of ownership or control of base property results in the automatic termination of grazing privileges attached thereto in the absence of a timely application to transfer those privileges to other qualifying base property. A "timely application" for transfer, we have held, can only be made while the original base property is within the ownership or control of the permittee. Fasselin v. BLM, 102 IBLA 9, 16 n.9 (1988); Jimmie and Leona Ferrara, 47 IBLA 335 (1980); Fillmore Ranches, 30 IBLA 282 (1977); Charles Stewart, 26 IBLA 160 (1976).

However, the issue in this case is whether Judge Child properly found that Gordon did not lose control of the base property.

In determining what constitutes "control," we have recognized that a permissive right to graze the property, the equivalent of a tenancy at will, does not constitute "control." Briggs v. BLM, 75 IBLA at 303;

Grabbert v. Schultz, 12 IBLA at 260-61, 80 Interior Dec. at 533-34. However, ownership is not required. To have control of a place is to have authority to manage, direct, superintend, or regulate. Grabbert v. Schultz, supra.

As distinguished from a tenancy at will, a lease of base property for a specific term has always been recognized by the Department as constituting "control." See Garcia v. Andrus, 692 F.2d at 92-93; Fasselin v. BLM, 102 IBLA at 17. As in the case of loss of ownership, control is vitiated by a loss of the leasehold interest. Garcia v. Andrus, supra.

In Garcia, the U.S. Court of Appeals for the Ninth Circuit held that Earl Platt, a Federal grazing leaseholder, had priority to renew his grazing leases in 1977 only to the extent that he retained control of the original preference land. Platt's lease of one-third of the preference land with Barbara Garcia, the holder of the life estate, expired in 1975. The Ninth Circuit Court concluded that one who loses a leasehold interest in a part of the preference land loses control to the same extent, and priority to renew his grazing lease in a proportionate amount.

Testimony elicited before Judge Child reiterates the Department's longstanding position that a lease constitutes sufficient proof of control.

> Q. [BY MR. DUNN] How do you determine whether an individual is controlling base property.
>
> A. [BY MR. WATSON] When a person applies for a grazing permit or lease the first time, we ask them to present evidence of ownership, and that's generally in the form of a Warranty Deed or a valid lease that shows that he either owns or controls the land.
>
> * * * * * * *
>
> Q. [BY MR. DUNN] How do you determine control? What criteria do you use as a (sic) area manager?
>
> A. [BY MR. WATSON] If a person does not have a Warranty Deed that shows he owns the land, we require them to have the land Lease that shows for a period of time he has control of that land.

(Tr. 111-12.)

Judge Child determined, based on the evidence introduced at the hearing, that Gordon exercised control over the base property. (Exs. G-18, A-21; Tr. 106, 112-13, 154-56, 158, 161, 202.) The BLM correctly maintains that it would be impossible for Gordon to have the same control over the property that he had as an owner. However, ownership is not required if control can be shown. Gordon's duties, as elicited in the testimony, include controlling livestock, managing the property, repairing of fences, and indemnifying the Grabows from claims by others. While BLM disputes

on appeal that Gordon exercised control over the base property, BLM presented no evidence refuting Gordon's testimony. Instead, BLM relies on the provision in the Pasture Use Agreement granting the Grabows the right to inspect and to terminate Gordon's right to graze if overgrazing occurs for its contention that Gordon did not retain the requisite control under the regulation.

The BLM's argument does not withstand careful analysis. Elimination of the limitation relied on by BLM would essentially place Gordon in the position of a bona fide owner, a position not typically associated with a lessee. It is difficult to conceive of a lease in which the prudent lessor (owner) does not retain some rights over control or management of the property, if for no other reason than to protect the lessor (owner) from liability. The BLM's assertion as to the likely motivation for the Grabows' retention of such rights is unsupported by evidence in the record and is properly dismissed as speculative.

The argument that upholding Judge Child's Decision would require BLM to deal with more parties than the permittees or lessees overlooks the fact that BLM currently supervises lessees as well as owners of base property.

Although the Pasture Use Agreement was not referred to in the warranty deeds, the Grabows' deeds of conveyance and the Pasture Use Agreement are separate agreements, deal with different issues, and are not inconsistent. They are properly construed together. 17 Am. Jur. 2d Contracts § 399 (1964); A.L. Corbin, Corbin on Contracts (1960), § 587 (separate, collateral agreements not merged), and § 594 (deeds of conveyance held generally not to be integrated agreements); A.L. Corbin, Corbin on Contracts (Supp. 1994), §§ 587, 594. The substance not the form of the agreement controls our construction of the rights granted under the Linn Agreement and the Pasture Use Agreement. See Arco Oil & Gas Co., 109 IBLA 34, 39 (1989). We agree with Judge Child's conclusion that the Pasture Use Agreement and the Linn Agreement are tantamount to leases. No error has been established by BLM in this conclusion.

Cases relied upon by BLM, including Briggs and Grabbert, are factually distinguishable. The Linn Agreement and Pasture Use Agreement are not permissive uses or tenancies at will. To the contrary, rights and obligations and specific terms are found in these agreements. The term of the Linn Agreement is the term of the mortgage. The Pasture Use Agreement provided for a term of 2 years and was extended through March 1997. Nor is this a case where the grazier relies on the mere assertion that he retained the grazing rights, without evidence of control of the base property. See Charles Stewart, supra, at 163. Because Gordon did not lose control, there was no need to apply for a transfer of the grazing preference to other base property.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of Administrative Law Judge Ramon M. Child is affirmed.

_____
Will A. Irwin
Administrative Judge

I concur:

_____
Bruce R. Harris
Deputy Chief Administrative Judge